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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SUNVALLEY SOLAR, INC., Plaintiff and Respondent, v. CANADIAN SOLAR INC., Defendant and Appellant.	B241810 (Los Angeles County Super. Ct. No. BC453272)

APPEAL from an order of the Superior Court of Los Angeles County, Malcolm H. Mackey, Judge. Reversed.

Latham & Watkins, Timothy P. Crudo, David E. Jang and Bryn M. McDonough for Defendant and Appellant.

Hartzler & Hartzler, Mark B. Hartzler; Law Offices of Bin Li and Bin Li for Plaintiff and Respondent.

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Canadian Solar Inc. successfully petitioned to compel arbitration of its dispute with Sunvalley Solar, Inc. pursuant to their predispute arbitration agreement. Several months after Canadian Solar's petition was granted, the trial court learned Sunvalley had not initiated arbitration proceedings. To "move things forward," the court sua sponte lifted the stay of judicial proceedings and set a trial date in the action. Canadian Solar appeals from that order,[1] contending the court acted in excess of its jurisdiction and frustrated Canadian Solar's right to arbitrate its dispute. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Canadian Solar manufactures solar products and solar systems solutions at its facilities in China. Sunvalley is a solar power technology and system integration company with its principal place of business in California. The two companies entered into a preferred territory distribution agreement permitting Sunvalley to sell Canadian Solar's products under certain terms in California, Arizona and Nevada. The agreement contained an arbitration clause expressly providing that any dispute in connection with the distribution contract shall be submitted to "China International Economic and Trade Arbitration Commission, Shanghai Branch" for binding arbitration in Shanghai.

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1 Both Canadian Solar and Sunvalley agree the order lifting the stay of judicial proceedings under Code of Civil Procedure section 1281.4 and setting a trial date is, in this case, the "functional equivalent" of an order denying a petition to compel arbitration and thus appealable. (See Code Civ. Proc., § 1294, subd. (a) [order denying petition to compel arbitration is appealable]; *MKJA, Inc. v 123 Fit Franchising, LLC* (2011) 191 Cal.App.4th 643, 655 [order denying a stay of litigation pending arbitration is the "functional equivalent" of an order denying a petition to compel arbitration" and thus is appealable under Code Civ. Proc., § 1294, subd. (a)]; *Henry v. Alcove Investment, Inc.* (1991) 233 Cal.App.3d 94, 98 [appeal may be taken from an order staying arbitration as "functional equivalent" of an order denying a petition to compel arbitration]; *International Film Investors v. Arbitration Tribunal of Directors Guild* (1984) 152 Cal.App.3d 699, 704 [appeal from judgment enjoining further arbitration proceedings was appealable as "practical equivalent" of order denying petition to compel arbitration and appeal therefrom is thus "consistent with the spirit and purpose" of Code Civ. Proc., § 1294].)

On January 19, 2011 Sunvalley sued Canadian Solar alleging breach of contract and related tort claims.[2] Canadian Solar demurred to the complaint on the ground it failed to state a cause of action. The trial court sustained the demurrer with leave to amend.

On June 13, 2011 Sunvalley filed a first amended complaint. In response Canadian Solar filed a petition to compel arbitration and stay judicial proceedings (Code Civ. Proc., §§ 1281.2, 1281.4).[3]

On August 4, 2011 the trial court granted Canadian Solar's petition to compel arbitration and ordered the arbitration to proceed in Shanghai in accordance with the parties' agreement. The court stayed all further judicial proceedings and set a status conference for October 31, 2011.

After some continuances a status conference was held on May 17, 2012. Sunvalley did not attend the status conference. Canadian Solar informed the court Sunvalley had not yet initiated arbitration proceedings and requested dismissal of the action without prejudice to eliminate the need for continued status conferences. The court denied Canadian Solar's request. Instead, over Canadian Solar's objection, the trial court sua sponte set a trial date in the action for December 24, 2012 and imposed discovery and law and motion deadlines. The court told Canadian Solar it was setting the trial date in order to move things forward: "Work on it. If you get the arbitration going amongst yourselves, that's fine. But I've set it for trial." "If there's a problem, we just go to trial. That's what we do."

DISCUSSION

1. *Standard of Review*

The question whether a trial court acted in excess of its jurisdiction by lifting the mandatory stay of judicial proceedings under section 1281.4 and setting a trial date is, on

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2 Sunvalley's first amended complaint named several other companies and individuals as defendants. Only Canadian Solar is a party to this appeal.

3 Statutory references are to the Code of Civil Procedure.

this undisputed factual record, a question of law reviewed de novo. (See *MKJA, Inc. v. 123 Fit Franchising, LLC* (2011) 191 Cal.App.4th 643, 657 (*MKJA*); *Cardiff Equities, Inc. v. Superior Court* (2008) 166 Cal.App.4th 1541, 1548.)

2. *Governing Law*

A party seeking to compel arbitration of a case filed in superior court must file a petition pursuant to section 1281.1 or plead the arbitration agreement as an affirmative defense to preserve the right to arbitrate. (§ 1281.5; *Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal.App.4th 1790, 1796 (*Brock*).) The party seeking arbitration must also move pursuant to section 1281.4 to stay the action; it is not stayed automatically by an order compelling arbitration. (*Brock,* at p. 1796; *Ross v. Blanchard* (1967) 251 Cal.App.2d 739, 742-743; see § 1281.4 [court shall stay action on motion of party following order compelling arbitration].) "This assertion of a contractual arbitration agreement constitutes a 'plea in abatement' of the action at law." (*Brock,* at p. 1796.)

Once the court orders arbitration and stays the judicial proceedings, "'the action at law sits in the twilight zone of abatement with the trial court retaining merely vestigial jurisdiction over matters submitted to arbitration.' [Citation.] During that time, under its 'vestigial' jurisdiction, a court may: appoint arbitrators if the method selected by the parties fails (§ 1281.6); grant a provisional remedy 'but only upon the ground that the award to which an applicant may be entitled may be rendered ineffectual without provisional relief' (§ 1281.8, subd. (b)); and confirm, correct or vacate the arbitration award (§ 1285)." (*Titan/Value Equities Group, Inc. v. Superior Court* (1994) 29 Cal.App.4th 482, 487 (*Titan*); accord, *Brock, supra,* 10 Cal.App.4th at p. 1796.)

In other words, the court's jurisdiction after arbitration has been ordered is controlled and circumscribed by the statutory scheme governing contractual arbitrations. (See § 1281 et seq.; *Titan, supra,* 29 Cal.App.4th at p. 487.) Other than those actions expressly authorized by statute, "no other judicial act is authorized." (*Titan,* at p. 487; see, e.g., *Byerly v. Sale* (1988) 204 Cal.App.3d 1312, 1316 [once the case was ordered into arbitration, trial court had no jurisdiction to dismiss action for failure to prosecute; it

was up to the arbitrator, not the court, to determine whether dismissal was warranted for failure to commence arbitration]; *Brock, supra,* 10 Cal.App.4th at pp. 1807-1808 [same]; *Blake v. Ecker* (2001) 93 Cal.App.4th 728, 738 ["rather than seek relief from trial court for plaintiff's failure to proceed in arbitration, defendants should have sought relief in the arbitration proceeding, by pursuing the remedies available under the arbitration agreement and the rules of the arbitration association designated therein"], disapproved on another ground in *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1101.)

3. *The Trial Court Erred in Lifting the Stay and Setting a Trial Date*

As Canadian Solar contends, the trial court exceeded its jurisdiction when it lifted the section 1281.4 stay and set a trial date in the action, effectively rewarding Sunvalley for its delay in initiating arbitration proceedings and depriving Canadian Solar of its right to arbitrate the dispute. In this regard, *Titan, supra,* 29 Cal.App.4th 482 is particularly on point: More than one year after the trial court had ordered arbitration and stayed the action pursuant to the parties' agreement to arbitrate, the plaintiffs in *Titan* expressed frustration with scheduling conflicts and other problems that had kept the arbitration from "getting off the ground" and requested the trial court to "take control of the case." (*Id.* at p. 485.) The trial court agreed and issued an order setting the matter for trial. On the defendants' motion for reconsideration, the trial court reaffirmed its earlier order compelling arbitration, imposed conditions on the arbitration including the number of continuances to be afforded to each side and left its order setting a trial date in place so the case could be tried "in the event of a failure to conduct the arbitration" by the court-ordered deadline. (*Id.* at p. 486.)

In a petition for writ of mandate/prohibition to compel the trial court to vacate its trial-setting order, the defendants in *Titan* argued the trial court's order, issued prior to the completion of arbitration, was in excess of the court's very limited jurisdiction. (*Titan, supra,* 29 Cal.App.4th at p. 488.) The *Titan* court agreed, explaining, once arbitration has been ordered and the matter stayed, the trial court has no authority under the statutory scheme governing contractual arbitration to set a trial date or otherwise grant relief for delay in bringing arbitration; that authority belongs to the arbitrator. (See

id. at p. 489; see also *Byerly v. Sale*, *supra*, 204 Cal.App.3d at p. 1316 ["arbitration has a life of its own outside the judicial system, and only the arbitrator should determine whether there has been an unreasonable delay in the prosecution which would justify a dismissal"].)

The instant appeal presents an even more compelling case for reversing the trial court's extrajurisdictional ruling than *Titan.* In *Titan* it was the defendants whose actions were causing delay in the arbitration proceedings. Here, Canadian Solar alleges, and Sunvalley does not dispute, that Sunvalley was dilatory in initiating arbitration proceedings following the court's order compelling arbitration. Nonetheless, without addressing in its appellate brief either *Titan* or analogous cases (see, e.g., *Byerly v. Sale*, *supra,* 204 Cal.App.3d at p. 1316; *Brock*, *supra*, 10 Cal.App.4th at p. 1808; *SWAB Financial, LLC v. E*Trade Securities, LLC* (2007) 150 Cal.App.4th 1181, 1200 (*SWAB*)), Sunvalley simply argues the court's order was authorized by section 1281.4, which it claims grants the trial court broad discretion to lift a stay even before arbitration has been completed. (See § 1284.1 [authorizing court, once arbitration has been ordered, to stay the action until the arbitration has been completed "or until such earlier time as the court specifies"].)

Sunvalley's expansive interpretation of section 1281.4 was squarely rejected in *MKJA*, *supra*, 191 Cal.App.4th 643. In *MKJA* the plaintiffs and defendants signed a predispute arbitration agreement requiring any controversy arising out of their underlying franchise contracts to be resolved in arbitration in Colorado in accordance with the rules of the American Arbitration Association (AAA). After a dispute arose, the plaintiffs filed a lawsuit in California alleging the defendants had fraudulently induced them to enter into various franchise agreements. The defendants responded by seeking a stay of the action, informing the trial court they had filed a petition in Colorado to compel arbitration of the dispute. The California court stayed the plaintiffs' action pending the Colorado court's resolution of the petition to compel arbitration. After the Colorado court granted the petition and ordered arbitration, the plaintiffs moved in the California action to lift the stay of judicial proceedings, contending the costs of arbitrating their dispute would be

prohibitive and the agreement to arbitrate was unconscionable. (The plaintiffs asserted, because the AAA did not allow for consolidation of cases, three sets of plaintiffs would have to separately pay for and conduct their own arbitrations.) The trial court initially denied the motion, but later granted a renewed motion after receiving additional evidence the plaintiffs could not afford to arbitrate. (*Id.* at pp. 650-651.) The court relied on section 1281.4, concluding that statute granted it discretion to "lift the stay of litigation in an appropriate case of this type." (*MKJA*, at pp. 652-653.)

On appeal the defendants argued the trial court lacked jurisdiction to interfere with the contractually authorized arbitration. The *MKJA* court agreed, holding the trial court's discretion to lift a stay under section 1281.4 must be narrowly circumscribed in light of the statutory purpose of preserving the arbitrator's jurisdiction and the parties' bargained-for arbitration rights: "[A] stay of related litigation is essential to the enforceability of an arbitration agreement since, in the absence of such a stay, a party could simply litigate claims that it agreed to arbitrate. Given the purpose of the statute, the most reasonable interpretation of the stay provision is that it grants a trial court discretion to lift a stay prior to the completion of arbitration only under circumstances in which lifting the stay would not frustrate the arbitrator's jurisdiction." (*MKJA*, *supra*, 191 Cal.App.4th at p. 660.)

The *MKJA* court posited a circumstance under which the trial court could lift a stay under section 1281.4 prior to the completion of arbitration without frustrating the arbitrator's jurisdiction: If a complaint were amended to remove the only arbitrable claim, there would be no reason for a stay of the litigation to remain in effect. (*MKJA*, *supra*, 191 Cal.App.4th at p. 661; cf. *SWAB*, *supra*, 150 Cal.App.4th at p. 1200 [absent agreement to withdraw controversy from arbitration, court has very limited jurisdiction once arbitration is ordered and litigation stayed]; *Titan*, *supra*, 29 Cal.App.4th at p. 489 [same].) Under those circumstances the court could lift its stay prior to completion of any arbitration. In contrast, the court explained, lifting a stay of litigation based upon a determination a party cannot afford the costs associated with the arbitration would

frustrate the arbitrator's jurisdiction and be "fundamentally inconsistent" with California's "'strong public policy favoring contractual arbitration.'" (*MKJA,* at p. 661.)

Sunvalley attempts to distinguish these cases limiting the trial court's authority on the ground arbitration proceedings had already commenced to some degree while, in the instant case, nothing relating to arbitration had yet been initiated: Without an ongoing arbitration, it contends, lifting the stay cannot possibly interfere with the arbitrator's jurisdiction.

Contrary to Sunvalley's suggestion, there is no indication in *MKJA* that arbitration proceedings had commenced; its distinction is illusory. More significantly, Sunvalley's interpretation of section 1281.4 would contravene the intent of the statutory scheme governing contractual arbitration. Under its approach a plaintiff unwilling to arbitrate would only need to delay initiation of the proceedings to create the potential for avoiding arbitration altogether, rewarding the plaintiff's dilatory conduct while undermining the parties' contractual arbitration rights and California's strong public policy favoring contractual arbitration: "'When it has been determined that arbitration should be pursued and all judicial proceedings . . . suspended until completion of the arbitration, it would be wholly incompatible with established policies of the law to permit the court thereafter to intervene in, and necessarily to interfere with, the arbitration ordered. In large measure, it would not only preclude the parties from obtaining "an adjustment of their differences by a tribunal of their choosing," but it would also recreate the very "delays incident to a civil action" that the arbitration agreement was designed to avoid.'" (*Titan, supra,* 29 Cal.App.4th at p. 488; accord, *MKJA, supra,* 191 Cal.App.4th at p. 660; see generally *People v. Pieters* (1991) 52 Cal.3d 894, 898-899 ["'[I]t is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend.' [Citations.] Thus, '[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.'"].)

In sum, whatever the extent of the court's vestigial jurisdiction following an order compelling contractual arbitration (compare *Bosworth v. Whitmore* (2006)

135 Cal.App.4th 536, 547-548 [court retains jurisdiction under § 1283.8 to set arbitration completion date or deadline for issuance of arbitration award] with *Titan*, *supra*, 29 Cal.App.4th at p. 487 [court's vestigial jurisdiction following order compelling arbitration is limited to appointing arbitrators if the method selected by parties fails (§ 1281.6), granting a provisional remedy under certain circumstances (§ 1281.8, subd. (b)) and confirming, correcting or vacating arbitration award (§ 1285); "no other judicial act is authorized"]), it plainly does not include the power to lift a stay and set a trial date in response to a plaintiff's alleged dilatory conduct in pursuing the arbitration. The court's order doing so was error. (*Titan*, at p. 488; *MKJA, supra*, 191 Cal.App.4th at p. 661.)

DISPOSITION

The May 17, 2012 order lifting the stay and setting a trial date is reversed. Canadian Solar is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.